92-179

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

WISHBONE, INC., a Colorado corporation; JOSEPH LOCHI; and, FRANCIS LOCHI,

Petitioners,

v.

LULA M. EPPINGER, Personal Representative of the Estate of Wilmer H. Eppinger,

Respondent.

Petition For Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the nonclaim provision of Colorado's Probate Code providing no notice to creditors of the running of a four (4) month statutory time period to file suit satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution?

2. Was the statutory time period of four (4) months too short to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Wishbone, Inc., a Colorado corporation; Joseph Lochi; and Francis Lochi. Respondent, Lula M. Eppinger, Personal Representative of the Estate of Wilmer H. Eppinger.

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OPINIONS BELOW

The opinion of the Colorado Court of Appeals is printed in Appendix A hereto, and is reported at 829 P.2d 434 (Colo. App. 1991). The Order of the Supreme Court of the State of Colorado denying certiorari is printed in Appendix B hereto.

JURISDICTION

The judgment printed in Appendix A, attached hereto, which Petitioners seek to have reviewed, was dated and entered on August 29, 1991. The Order of the Supreme Court of the State of Colorado denying certiorari was dated and entered on April 27, 1992. The jurisdiction of this Court is invoked under Sections 1257(a) and 2101(c) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The Constitution of the United States of America.

Amendment Fourteen, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

A. Section 15-12-803(2), Colo. Rev. Stat. (1987 Repl. Vol. 6B):

> "All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> "(a) A claim based on a contract with the personal representative, within 4 months after performance by the personal representative is due;
>
> "(b) Any other claim, within 4 months after it arises."

B. Section 15-12-804(2), Colo. Rev. Stat. (1987 Repl. Vol. 6B):

> "A claimant having a claim described in section 15-12-803(1) may commence a proceeding against the personal representative in the court where the personal representative was appointed to obtain payment of his claim. A claimant having a claim described in section 15-12-803(2) may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction under the rules of civil procedure or

statutes of this State to obtain payment of his claim against the estate. The commencement of any proceeding on any claim, however, must occur within the time limited for presenting the claim. The personal representative shall inform any interested person, upon request, as to the existence, amounts, and nature of all claims against the estate which are known to him, but he shall not be required to express any opinion as to the probable outcome thereof."

C. Section 15-12-102(1), Colo. Rev. Stat. (1987 Repl. Vol. 6B):

"Except as provided in section 15-12-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court; except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:

"(a) No court proceeding concerning the succession or administration of the estate has occurred, and

"(b) Either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings."

D. Section 15-12-103, Colo. Rev. Stat. (1987 Repl. Vol. 6B):

"Except as otherwise provided in article 13 of this title, to acquire the powers and undertake

the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify, and be issued letters. Administration of an estate is commenced by the issuance of letters."

E. Section 15-12-104, Colo. Rev. Stat. (1987 Repl. Vol. 6B):

"No proceedings to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 15-12-1004 or from a former personal representative individually liable as provided in section 15-12-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein."

F. Section 15-12-109, Colo. Rev. Stat. (1987 Repl. Vol. 6B):

"No statute of limitations running on a cause of action belonging to a decedent which had not been barred as of the date of his death shall apply to bar a cause of action surviving the decedent's death sooner than one year after death. A cause of action which, but for this section, would have been barred less than one year after the death is barred after one year unless tolled."

G. Section 15-12-310(1), Colo. Rev. Stat. (1987 Repl. Vol. 6B):

> "The moving party must give notice as described by section 15-10-401 of his intention to seek an appointment informally;
>
> "(a) To any person demanding it pursuant to section 15-12-204; and
>
> "(b) To any person having a prior or equal right to appointment not waived in writing and filed with the court."

STATEMENT UNDER 28.4(c)

Since the proceeding draws into question the constitutionality of Title 15, Colo. Rev. Stat. 15-12-803(2), and Title 15, Colo. Rev. Stat. 15-12-804(2), state statutes affecting the public interest, and neither the State of Colorado nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. section 2403(b) may be applicable.

No court of the United States as defined by 28 U.S.C. section 451 has, pursuant to 28 U.S.C. section 2403(b), certified to the State Attorney General the fact that the constitutionality of such statutes has been drawn in question.

STATEMENT OF THE CASE

On February 25, 1988, Wilmer H. Eppinger, now deceased, entered into a contract with Petitioners, Wishbone, Inc., Joseph Lochi and Francis Lochi ("Petitioners"

or "Wishbone"). The terms of the contract required Mr. Eppinger to deliver title to Petitioners for the following described real estate situated in the State of Colorado, to-wit:

> "Lots 9 and 10, Hollyhurst Subdivision, County of Adams, two acres more or less."

Unknown to the Petitioners, the true legal description contained in the deed differed from the contract description. The deed contained the following description:

> "Plots 9 and 10, except that portion conveyed to the Department of Highways in Deed recorded August 11, 1961, in Book 926 at Page 293 and except that portion dedicated to the Public in right of way dedication recorded August 28, 1972, in Book 1815 at Page 496, Hollyhurst, County of Adams, State of Colorado."

Mr. Eppinger died on March 9, 1988.

On June 8, 1988, Respondent, Lula M. Eppinger, Personal Representative of the Estate of Wilmer H. Eppinger ("Respondent" or "Personal Representative"), executed a Personal Representative's Deed conveying substantially less than two (2) acres to Petitioners. The matter was referred to Petitioners' counsel on or about July 1, 1988, and on July 6, 1988, well before the Colorado nonclaim statutory period expired, counsel notified the Personal Representative of the claim against the estate.

On or about July 15, 1988, the Personal Representative's counsel mailed a letter advising Petitioners' counsel that the Personal Representative disputed the claim and requested more time to research the claim. The letter also

requested " . . . continuing communication with you prior to any court action concerning a possible resolution of this matter."

On December 30, 1988, Petitioners filed their Complaint in the District Court of Adams County, Colorado, against the Personal Representative; 888 Real Estate, Inc.; and Charlene Molden.

On November 13, 1989, the District Court of Adams County granted the Personal Representative's Motion for Summary Judgment dismissing the Complaint against the estate for failure to comply with the time period contained in the Colorado Probate Code nonclaim statute, sections 15-12-803(2) and 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B). The Petitioners raised their due process claims in their Response to the Respondent's Motion for Summary Judgment. However, the District Court did not address the constitutional issues in its ruling.

Upon trial to a jury, a verdict was returned for Wishbone against the remaining defendants (888 Real Estate, Inc. and Charlene Molden) on November 15, 1989.

An appeal followed in which, *inter alia*, Petitioners raised their due process claims, and the trial court's decision was affirmed in an Opinion rendered August 29, 1991, by the Colorado Court of Appeals, Division I, State of Colorado. The Court of Appeals of Colorado rendered its decision denying a violation of Petitioners' due process rights under the Fourteenth Amendment of the United States Constitution on August 29, 1991. A Petition for Rehearing of this decision was filed with the Colorado Court of Appeals on September 12, 1991, and rehearing was denied on October 17, 1991. Petitioners then

requested, and were granted, an enlargement of time to file a Petition for Certiorari with the Colorado Supreme Court. A Petition for Writ of Certiorari was timely filed on December 18, 1991, with the Supreme Court of Colorado in which Petitioners again raised their due process claims, and said Petition was denied on April 27, 1992. Petitioners filed a Motion to Stay Issuance of Mandate, which motion was denied on May 12, 1992. On May 21, 1992, Petitioners filed a Motion to Recall Mandate and Stay Proceedings, which motion was granted on May 26, 1992, to and including July 27, 1992.

On or before July 27, 1992, counsel for Petitioners filed with the Supreme Court of the United States of America this Petition for Writ of Certiorari to review the final judgment of the Court of Appeals of the State of Colorado entered on August 29, 1991.

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION

This Court has indicated through its decisions in numerous and varied situations that if a creditor's identity is known or reasonably ascertainable, then the due process clause requires that the creditor be given "notice by mail or other means as certain to ensure actual notice." (See, e.g. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), and the cases cited therein.)

Nonclaim statutes for creditors in a probate proceeding are currently in effect throughout the United States. Several states, including Colorado, have substantially

adopted the provisions of the Uniform Probate Code. The cases interpreting these nonclaim statutes have, as an underlying policy consideration, the prompt and orderly settlement of estates. The arguments offered to defeat the claim of unconstitutionality of the nonclaim statute in various State Court decisions have included arguments that there is no adjudication of property rights, that no State action is involved, thereby triggering the due process clause, and that a nonclaim statute is a statute of limitations. In the present case, the Court of Appeals of the State of Colorado determined that the state action involved was insufficient to trigger the due process clause.

However, in *Pope*, 485 U.S. 478, and cases cited therein, this Court held:

> "That Oklahoma's nonclaim statute is not a self-executing statute of limitations. Rather, the statute operates in connection with Oklahoma's probate proceedings to 'adversely affect' appellant's property interest. Thus, if appellant's identity as a creditor was known or 'reasonably ascertainable,' then the due process clause requires that appellant be given '[n]otice by mail or other means as certain to ensure actual notice.'" *Pope, supra*, at 491 (quoting *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983))

In the instant case, as well as in shorter term statutes of some other jurisdictions, before the nonclaim statute is activated, several significant actions must be taken by the probate court, involving, for example, validating of the will, notice of appointment, and issuance of letters testamentary. Without these actions being taken, the shorter term nonclaim statutes will never become operative.

Under Colorado's Probate Code, no proceeding to enforce a claim may be commenced before the appointment of a personal representative [section 15-12-104, Colo. Rev. Stat. (1987 Repl. Vol. 6B)].

A related argument is that a nonclaim statute is a statute of limitations. A nonclaim statute and a statute of limitations have little in common other than the running of a statutory time period. Contrasting the differences between a nonclaim statute and a statute of limitations illustrates the harsh difference in application of the two (2) types of statutes. A statute of limitations in a civil action has traditionally been considered a statute of repose that prevents the assertion of stale claims. In those states with a longer time period within which to present claims, which such period is generally one (1) to two (2) years, the characterization of such period as a statute of limitations is a fair one. However, in those statutes with a shorter time period within which to file claims, four (4) months in the instant case, there is no consideration for repose and a claim certainly could not become stale after only four (4) months. Such a statute cannot be characterized, either in its application or by definition, as a statute of limitations, particularly where, as in the instant case, the general statute of limitations for the claims filed against the estate was three (3) years.

In the instant case, significant action by the Probate Court is necessary to activate the nonclaim statute. However, no notice at all is required. An analysis of the application of Colorado's short term nonclaim statute and the absence of any notice at all reveals that traditional notions of due process are wholly lacking and that the statute does not provide the kind of notice contemplated

and required under the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioners were known creditors to the Personal Representative, currently represented by known counsel, with a known business address in Commerce City, Colorado. Petitioners timely presented their claim to the Personal Representative on July 6, 1988. Petitioners had a right to receive reasonable notice of the reduced time for filing a suit under the Probate Code. In the instant case, no notice was given.

For these reasons, a Writ of Certiorari should be granted by this Supreme Court of the United States of America so that review and rectification can be allowed.

II. NOTICE AS REQUIRED BY THE FOURTEENTH AMENDMENT

The due process clause of the Fourteenth Amendment of the United States Constitution requires that a person be "properly and reasonably notified" of a pending action. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877).

As was stated in *Mullane v. Central Hanover Bank and Trust Company*, 399 U.S. 306 (1950), due process requires that a reasonable method of notification, given all circumstances, must be supplied to interested parties. A "reasonable method" of notification is *that method which, given the circumstances, is most likely to reach the other parties.*

This Court in *Continental Insurance Company v. Moseley*, 463 U.S. 1203 (1983) (Moseley Memorandum Decision), vacated the Nevada Supreme Court decision

that publication notice was sufficient to afford due process to a known creditor making a claim in a probate proceeding. *Continental Insurance Company v. Moseley*, 653 P.2d 158 (Nev. 1982) (Moseley I). The case was remanded for further consideration in light of the *Mennonite* case just then decided. On remand, the Nevada Supreme Court held that the due process requirements of *Mullane*, that were reaffirmed in *Mennonite*, applied to the type of notice required to a known creditor in a probate case. *Continental Insurance Company v. Moseley*, 683 P.2d 20 (Nev. 1984) (Moseley II).

The Oklahoma Supreme Court in *Pope* subsequently decided that the Nevada Supreme Court's decision was wrong. The judgment of the Oklahoma Supreme Court was reversed by this Court citing *Mennonite*. *Pope, supra*, at 491.

In the present case, the Court of Appeals of the State of Colorado determined that due process was not denied based upon arguments of law that there was insufficient state action to trigger the due process clause. This is in conflict with the holding of this Court in *Pope*.

The Federal District Court for the District of Colorado in *Armstrong v. Armstrong*, 130 F.R.D. 449 (D. Colo. 1990), addressed the same nonclaim statutory section at issue in the present case. In *Armstrong, supra*, the Federal District Court stated:

> "However, based upon the Supreme Court's holding in *Pope, supra*, I conclude that the relevant inquiry is not whether defendants had actual knowledge that decedent's estate was open, but rather, whether defendants had actual

notice of the deadline for filing claims against decedent's estate." Id, at 453.

An analysis of this Court's decisions in *Pope* and *Moseley* will illustrate that the short term nonclaim statute of the Colorado Probate Code does involve sufficient state action to trigger the due process clause. The Court of Appeals of the State of Colorado determined that the Colorado nonclaim statute was "self-executing". That determination is not in accord with the recent decisions of this Court and directly contradicts the holding of this Court in *Pope*.

The absence of notice to creditors regarding the time for filing claims against the estate clearly does not inform any creditor that the general three (3) year statute of limitations has been reduced. Written notice mailed to the Petitioners of the reduced time for filing their claim would have satisfied the due process clause of the U. S. Constitution. Under the circumstances of the instant case, such notice would have required little additional time and effort.

For these reasons, a Writ of Certiorari should be granted by this Supreme Court of the United States of America so that review and rectification can be allowed.

III. LENGTH OF TIME AND REASONABLENESS

In *Pope*, this Court made it clear that if a typical nonclaim statute is applied, known or ascertainable creditors must be given actual notice. Although *Pope* did not address the question of length of time, and the Oklahoma statute in *Pope* gave creditors only two (2) months from

publication to file their claims, in light of this Court's implicit rejection of a one-year period from death as sufficient to cure lack of notice in *Pope*, four (4) months in the instant case is too short a period to permit a reasonable opportunity for a claimant to respond.

The avoidance of stale claims (lost evidence, missing witnesses and dim memories) and repose are common justifications for all statutes of limitations. In the instant case concerning creditors' claims against an estate, there is no need to apply a shorter limitations period than that already in place for the Petitioners' claim. For reasons of repose and avoidance of stale claims, the Colorado Legislature has deemed it suitable to allow two (2) years to bring a tort claim and three (3) years to bring a contract action. There is no reason to shorten that period if the obligor is deceased or doing business as an estate. The claim will get no more stale, no more witnesses will die and no more evidence will be lost than if the debtor were still alive and doing business as an individual. The obligor will not have potential liability pending for a longer period. The normal statute of limitations is more than adequate, therefore, to take care of the need for repose and the fear of stale claims, and there is no justification for reducing it for probate creditors. Further, under Colorado's Probate Code, the estate itself enjoys a *minimum* one (1) year limitations period from the date of death. Section 15-12-109, Colo. Rev. Stat. (1987 Repl. Vol. 6B).

As for the need to wind up estates quickly, it must be noted that Petitioners timely presented notice of their claim to the Personal Representative on July 6, 1988. In any event, how quickly can estates be closed with or

without a four (4) month bar? Although many small estates can be settled quite rapidly, many, if not most, large or complex estates will take from one (1) to several years before final distribution. Few would be closed within one (1) year of death, regardless of the length of claims. This is not to suggest that claims should not be dealt with as expeditiously as possible, but only that, if winding up estates is the issue, it is not affected by the present, reduced claims period of four (4) months.

Why should a decedent's successors, in their understandable desire to put the death behind them and get on with life, be given a shorter period of repose than was the decedent? Why should they not take the decedent's property subject to the same liability – and the same time limitations on that liability – as the decedent? If the substantive claim survives, logically so should the procedural statutory limitations that render it valid and enforceable.

To protect creditors from undue loss of valid claims, sufficient time must be provided to assure a reasonable likelihood that a diligent creditor be on notice of the need to investigate and file a claim. To this period must be added sufficient time to act on the knowledge of the claim. Four (4) months is clearly inadequate. A minimum of approximately eighteen (18) months seems appropriate to satisfy the interests of most commercial creditors, and to be a reasonable compromise with the interests of most estates.

IV. SUMMATION

We think that it was not constitutional to afford no notice to creditors when Petitioners were known creditors to the Personal Representative. Rather than mailing a notice to Petitioners, the Personal Representative mailed a letter requesting further discussion before any action was taken. No notice of the time for filing claims against the estate was mailed or received.

Due process means fair and equitable procedure. The law has always represented substantial justice, and a party should never be allowed to use a procedure in a way which would eliminate the opposition's legal claim. To meet the constitutional test of reasonable notice, statutes and rules should require that a bona fide good faith attempt be made to give actual notice to the involved parties. The absence of any notice of the reduced time to file claims against the estate fails the constitutional test of justice required by the Fourteenth Amendment.

In conclusion, it must be stated that the due process clause of the Fourteenth Amendment, as applied in *Pope* and *Moseley*, warrants the issuance of a Writ of Certiorari to review the decision of the Court of Appeals of the State of Colorado.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated: This 27 day of July, 1992.

Respectfully submitted,

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/s/ NATHAN M. BERGER

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APPENDIX A

COLORADO COURT OF APPEALS August 29, 1991
No. 90CA0225

Wishbone, Inc., a Colorado corporation; Joseph Lochi and Francis Lochi,

Plaintiffs-Appellants,

v.

Lula M. Eppinger, personal representative of the estate of Wilmer H. Eppinger,

Defendant-Appellee.

Appeal from the District Court of Adams County
Honorable Donald W. Marshall, Jr., Judge
No. 88CV2601A

Division I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Ruland and Dubofsky, JJ., concur

Berger & Berger, Nathan M. Berger, David Berger, Commerce City, Colorado, for Plaintiffs-Appellants

Aisenberg & Kaplan, P.C., Bennett S. Aisenberg, H. Paul Himes, Jr., Denver, Colorado, for Defendant-Appellee

Plaintiffs, Wishbone, Inc., and Joseph and Frances Lochi, appeal the dismissal of their claims by the entry of a summary judgment in favor of defendant, Lula Eppinger, personal representative of the Estate of Wilmer Eppinger. We affirm.

On February 25, 1988, the Lochis and the deceased entered into a receipt and option contract for the sale and purchase of "Lots 9 and 10, Holly Hurst Subdivision,

County of Adams, Two acres more or less." The contract also provided that the property would be sold "with all easements and rights-of-way appurtenant thereto," and would be free and clear of all liens, encumbrances, and easements except "those of record."

The decedent died in March 1988, and defendant was appointed later that month as personal representative to the estate. On June 8, 1988, the personal representative delivered a deed for the subject property to plaintiffs. The deed conveyed "Plots 9 and 10, Except that portion conveyed to the Department of Highways in Deed recorded August 11, 1961 . . . and except that portion dedicated to the Public in right of way dedication recorded August 28, 1972. . . . "

Plaintiffs accepted the deed and tendered the purchase price as agreed. They claim that later that day they discovered that only 1.711 acres was actually conveyed, such being less than the two acres specified in the contract.

On July 6, 1988, plaintiffs presented to the personal representative their claim against the estate in which they requested an abatement to reflect the alleged deficiency between the deed tendered and the conveyance agreed upon in the contract. On July 15, 1988, defendant's attorney responded to plaintiffs' letter in what the trial court determined was notice of disallowance of the claim.

The letter informed plaintiffs "that you do not have grounds for any lawsuit against the estate." The letter, however, contained no notice that, pursuant to § 15-12-806(1), C.R.S. (1987 Repl. Vol. 6B), there was a 60-day time limit for them to file their claim with the district

court. Plaintiffs filed their claim in district court on December 30, 1988.

I.

Section 15-12-806(1) provides, in pertinent part, that any claim disallowed by the personal representative is barred:

> "unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance . . . if the notice warns the claimant of the impending bar."

Under § 15-12-806(2), C.R.S. (1987 Repl. Vol. 6B), the court may allow, in whole or in part, any claim presented to the personal representative or filed in due time with the court upon petition of the personal representative or claimant if such claim is not barred by § 15-12-806(1).

The question presented here seeks a determination of the effect, under the non-claim statute, § 15-12-801, et seq., C.R.S. (1987 Repl. Vol. 6B), of the personal representative's failure to provide notice of the applicable 60-day time bar in her notice disallowing claims against the estate.

Plaintiffs argue that the timely presentment of their claims to the personal representative pursuant to § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B) vested the trial court with jurisdiction and arrested the application of the non-claim statute. Plaintiffs further argue that the personal representative's noncompliance with the non-claim statute, by her failure to notify plaintiffs of the 60-

day time bar contrary to § 15-12-806(1), in effect tolled the non-claim statute. Hence, they conclude that this failure to trigger the provisions of the non-claim statute invokes either a three or two-year statute of limitations otherwise applicable to plaintiffs' claims, §§ 13-80-101 and 13-80-102, C.R.S. (1986 Repl. Vol. 6A).

Plaintiffs contend that to reach another result would render § 15-12-802, C.R.S. (1987 Repl. Vol. 6B) meaningless. We, however, conclude that the result sought by plaintiffs is contrary to Colorado authority and inconsistent with the purposes of the Colorado Probate Code.

Generally, a claim is allowed by failure of the personal representative to disallow it. *In re Estate of Hamilton v. Egan*, 633 P.2d 1100 (Colo. App. 1981). And, a claim which is defectively or improperly disallowed is treated as though it were allowed. *See In re Estate of Roddy*, 784 P.2d 841 (Colo. App. 1989).

There is no dispute here that the personal representative failed to notify plaintiffs of the time bar as required under the statute. However, the failure to provide notice of the applicable time limitation did not render the disallowance itself defective. Rather, the issue to be determined is the time bar now applicable to plaintiffs' claims.

The non-claim statute provides that the commencement of any proceeding on a claim must occur within the time limited for presenting the claim, which in this case is four months from when defendant's performance was due. Section 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *see* § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B). And, although the 60 days in which to commence a proceeding after the mailing of notice of disallowance may be

extended by the court or personal representative, any extension may not "run beyond the applicable statute of limitations." Section 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B).

Section 15-12-802 instructs as to the applicable limitations and provides, in relevant part:

> "For purposes of any statute of limitations other than those limitations specified in §§ 15-12-801, 15-12-803, 15-12-804, and 15-12-806, the proper presentation of a claim under § 15-12-804 is equivalent to commencement of a proceeding on the claim."

Contrary to plaintiffs' assertions, and even if we assume the inapplicability of the 60-day time limit in which to commence claims, this language does not indicate a departure from the applicable time limits under the non-claim statute for claims brought *against the estate. See In re Estate of Wehling*, 37 Colo. App. 276, 547 P.2d 1289 (1976), *aff'd sub nom. Kropp v. Farmers Insurance Exchange*, 193 Colo. 144, 563 P.2d 943 (1977) (time limitations under Colorado Probate Code do not apply to actions *on liability insurance policies* issued to the decedent).

Section 15-12-803 provides a four-month period in which all claims against the estate must be filed. *See In re Estate of Daigle*, 634 P.2d 71 (Colo. 1981). Failure of plaintiffs' to file a claim that could be considered within that period removed jurisdiction from the trial court to consider that claim. *In re Alperstein v. Sherwood International, Inc.*, 778 P.2d 279 (Colo. App. 1989). And, this time limitation of four months is "much shorter than, and supersedes, all statutes of limitation which might otherwise

have been applicable." *In re Estate of Scott*, 735 P.2d 924 (Colo. App. 1987).

The basic purpose of the Colorado Probate Code is to promote the speedy and efficient settlement of estates. As such, the time limit under the non-claim statute for presentation of a claim is jurisdictional in character. *In re Estate of Daigle, supra; Strong Brothers Enterprises, Inc. v. Estate of Strong*, 666 P.2d 1109 (Colo. App. 1983).

Compliance with the non-claim statute is a condition precedent to the enforcement of a right of action, as opposed to its remedy. Failure to comply with the non-claim statute bars claims asserted after its expiration and deprives both the trial court and reviewing court of jurisdiction over the subject matter of the claim. *In re Estate of Randall v. Colorado State Hospital*, 166 Colo. 1, 441 P.2d 153 (1968); *In re Estate of Plank v. Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973).

Based upon the foregoing analysis, we conclude that the mandatory warning invokes the 60-day time bar only, and failure to give such notice affects only that time bar. *See* § 15-12-806(1). Since it cannot be said here that the failure to warn of the 60-day time bar defeated the substance or intended effect of the notice of disallowance, failure of defendant to comply strictly with this notice requirement only relieves plaintiffs of the requirement to file their claim seeking allowance within 60 days. *See* § 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B) (60 day limit may be extended).

Plaintiffs' claims, therefore, are, by virtue of § 15-12-809(2) [sic], barred under the non-claim statute

for failure file them within the applicable four-month period.

Plaintiffs have cited no case law or policy to support their contention that a failure to provide notice of the 60-day time bar removes their claim from the requirements and policies of the probate code or implicates the general statutes of limitation. Moreover, a non-claim statute is not a statute of limitations, *In re Estate of Randall, supra,* and to employ such a construction would frustrate the statutory goal underlying the distribution of estates. *In re Estate of Daigle, supra.* Since it affects the jurisdiction of the court to act; it is an absolute bar which cannot be tolled or waived, either intentionally or by implication. *In re Estate of Scott, supra; Barnhill v. Public Service Co.,* 649 P.2d 716 (Colo. App. 1982).

Here, plaintiffs' claim was required to be filed within four-months after performance by the personal representative was due, or by October 8, 1988. *See* §§ 15-12-803(2)(a) and 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *In re Estate of Scott, supra.* Failure to have done so bars plaintiffs' claim against the estate.

II.

Plaintiffs contend that the application of the non-claim statute violates their rights to due process since they were given no actual notice regarding the operation of the non-claim statute.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), upon which plaintiffs rely here, is inapposite. The non-claim statute at issue in *Tulsa* involved substantial state action.

The probate court was significantly involved throughout the probate proceedings, and the time bar was activated by that involvement.

By contrast, the non-claim statute here is self-executing in that it is not triggered by legal proceedings, but automatically lapses upon the expiration of the statutory period. Given this self-executing feature, the lack of prior actual notice to plaintiffs of the operation of the statute does not constitute a deprivation of due process. *See Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

Also without merit is plaintiffs' contention that the statutory time period is too limited to have afforded plaintiffs due process. The government has an interest in the speedy and efficient settlement of estates, *In re Estate of Daigle, supra*, and plaintiffs are presumed to have knowledge of the relevant statutory provisions from the General Assembly's enactment of the statute. *See Texaco, Inc. v. Short, supra; see also Dove v. Delgado*, 808 P.2d 1270 (Colo. 1991) (two-year period for filing negligence action not so short as to deny due process).

III.

Plaintiffs' final contention is that the trial court erred in determining, contrary to the intent of the parties, that the contract merged into the deed. We find it unnecessary to resolve this issue given the bar to plaintiffs' claim against the estate.

Judgment affirmed.

JUDGE RULAND and JUDGE DUBOFSKY concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 91SC686
CERTIORARI TO THE COLORADO COURT OF APPEALS 90CA0225
ADAMS COUNTY DISTRICT COURT 88CV2601

ORDER OF COURT

WISHBONE, INC., a Colorado corporation; JOSEPH LOCHI and FRANCIS LOCHI,

Petitioners,

v.

LULA M. EPPINGER, Personal Representative of the Estate of Wilmer H. Eppinger,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 27, 1992.

[SEAL]

Supreme Court
State of Colorado
certified to be a full, true and correct on

APR 27 1992

MAC V. DANFORD
Clerk of the Supreme Court

By /s/ Michele Illegible
Dep.

Court
Seal

cc: Nathan M. Berger
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James Benway, Clerk
Colorado Court of Appeals

Supreme Court, U.S.
FILED
AUG 25 1992
OFFICE OF THE CLERK

No. 92-0179

In The

Supreme Court of the United States

October Term, 1992

WISHBONE, INC., a Colorado corporation; JOSEPH LOCHI; and, FRANCIS LOCHI,

Petitioners,

v.

LULA M. EPPINGER, Personal Representative of the Estate of Wilmer H. Eppinger,

Respondent.

Petition For Writ Of Certiorari To The Colorado Court of Appeals

BRIEF IN OPPOSITION

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I. RESPONDENT'S STATEMENT OF THE CASE

Respondent Eppinger incorporates by reference as her statement of relevant facts the trial court's Finding of Facts which are summarized in the decision of the Colorado Court of Appeals, a copy of which is attached as Appendix A to the Petition for Writ of Certiorari, and which for convenience respondent also attaches as Appendix A to this response. Specifically, respondent wishes to point out to this Court that petitioners' statement of the case fails to reflect certain of those important facts (Appendix A, pgs. 1-3), as follows:

1. The receipt and option contract between the petitioners and Wilmer Eppinger called for the property to be conveyed free and clear of all liens, encumbrances, and easements *except those of record*. Pursuant to that contract, Mrs. Eppinger, the respondent, who was appointed in March of 1988 as personal representative of the estate of Wilmer Eppinger, executed a deed to the petitioners conveying said lots 9 and 10, except certain matters which had long since been of record. Of critical importance is the undisputed fact that the petitioners knew, when they accepted the deed, of Mr. Eppinger's death, of the existing probate proceedings, and of Mrs. Eppinger's appointment as personal representative of the estate and her delivery of the deed to the property in that capacity. Petitioners accepted the deed and tendered the purchase price as agreed, and claim it was only later that day of closing they discovered that only 1.711 acres was actually conveyed. Upon presentation of their claim to the personal representative, respondent's attorney responded (the July 15, 1988 letter) to petitioners' claim in what the trial court determined was a notice of disallowance of the

claim, informing petitioners "that you do not have grounds for any lawsuit against the estate". The decision of the Colorado Court of Appeals, which the Colorado Supreme Court declined to review, makes very clear that C.R.S. 15-12-803 requires that such claims against the estate must be filed within four months after performance by the personal representative was due or the court loses jurisdiction to determine the claim, and that the claim was not filed within that period. Since the performance by the personal representative was due on the same date that the petitioners claim they first discovered what they allege to be a breach of that performance, the petitioners had four full months in which to file their lawsuit. The facts are also clear that since the petitioners' attorney promptly received a response to the claim submitted to the personal representative, the petitioners had almost three full months from the date that their claim was denied within which to file their lawsuit.

II. SUMMARY OF RESPONDENT'S ARGUMENT

This case involves the application of the Colorado Probate Code non-claim statute, C.R.S. 15-12-801 et seq. The trial court granted respondent Eppinger's Motion for Summary Judgment dismissing all of the petitioners' claims on the basis that petitioners did not comply with the provisions of this statute. Under the non-claim statute, claimants must do two things. First, they must present a claim within four months after performance by the personal representative is due. Secondly, if the claim is disallowed, they must commence a proceeding on the claim within either that four month period or a 60 day

period, depending upon the circumstances of the disallowance. The trial court concluded that a claim was presented in early July, 1988, at which time petitioners were fully aware of the underlying facts on which they based their claim. The claim was disallowed on July 15, 1988. A proceeding on the claim was not commenced until December 30, 1988, approximately six and one-half months after the performance by the personal representative was due. On this basis, the trial court properly dismissed all of petitioners' claims against respondent for failure to comply with the non-claim statute.

C.R.S. 15-12-803 and 804 constitute a self-executing non-claim statute. That is, the non-claim statute is triggered only by the date on which performance is due with respect to claims based on contracts with the personal representative, and triggered only on the date of the acts which give rise to the claim in all other cases. There is no significant state involvement in triggering the non-claim statute, and, therefore, the Fourteenth Amendment's due process clause is not implicated. Even if the Fourteenth Amendment's due process clause was implicated, the issue is moot because the plaintiffs had actual knowledge of the pendency of the estate proceedings when their alleged cause of action arose. In light of the purpose behind the four month non-claim provision of C.R.S. 15-12-803 (to satisfy the needs of the heirs and devisees of a decedent through an expeditious distribution of property), and especially under the circumstances of this case where no fundamental unfairness exists, the non-claim statute does not deny due process.

III. REASONS FOR DECLINING TO GRANT THE WRIT

a. C.R.S. 15-12-803 and 804 constitute a self-executing non-claim statute, and, as such, are not affected by due process requirements of the Fourteenth Amendment.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 99 L.Ed.2d 565, 108 S. Ct. 1340 (1988), relied upon by petitioners, involved an issue of whether Oklahoma's two month probate non-claim statute which was triggered by publication of notice to creditors violated due process under the Fourteenth Amendment. The U.S. Supreme Court, while reaffirming that a cause of action is property protected by the Fourteenth Amendment's due process clause, qualified its operation.

> "The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state – sanctioned private remedies or procedures does not rise to the level of state action . . . . Nor is the State's involvement in the mere running of a general statute of limitations generally sufficient to implicate due process . . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found . . . . The question here is whether the State's involvement with the non-claim statute is substantial enough to implicate the Due Process Clause." [pp. 484, 485].

Reaffirming the principles set forth in its decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L.Ed.2d 738, 102 S. Ct. 781 (1982), the Supreme Court stated in unmistakably clear language that

> *"due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations . . . "* [Emphasis supplied.] [p. 486].

The Court stated that it was the self-executing feature of a statute of limitations that leaves it unaffected by the Fourteenth Amendment's due process requirements.

> "The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." [pp. 486, 487]

In *Pope,* the Court found significant state involvement in the Oklahoma non-claim statute *triggered by publication of notice to creditors,* and therefore the statute was not self-executing and was subject to the due process requirements of the Fourteenth Amendment. These factors are not present in the non-claim provisions of C.R.S. 15-12-801 et seq.

> "The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The non-claim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice;

section 331 directs the executor or executrix to publish notice, 'immediately' after appointment. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to 'immediately give notice to creditors'. The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. Section 332. It is only after all these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." [*Pope*, at p. 487].

"Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. . . . In sum, the substantial involvement of the probate court throughout the process leaves little doubt that the running of Oklahoma's non-claim statute is accompanied by sufficient government action to implicate the Due Process Clause." [*Pope* at p. 487].

In the case before this court, the probate court's involvement is not substantial, if it exists at all. The legal proceedings do not trigger the time bar. Instead, the time bar of C.R.S. 15-12-803 and 804 is triggered by the factors which trigger most statutes of limitation. Regarding claims based upon contract with the personal representative (15-12-803(2)(a)), *the time bar is triggered by the date on*

which performance by the personal representative is due. The probate proceedings have nothing at all to do with triggering the time bar for any other claims such as are enumerated in 15-12-803(2)(b); *the time bar is triggered by the acts which give rise to the claim.*

b. Due process under the Fourteenth Amendment requires no more than actual notice of the pendency of the action. The issue is moot because it is undisputed that plaintiffs had actual notice of the pendency of the estate proceedings.

Assuming only for argument's sake that the due process requirements set forth in *Pope* apply to the non-claim provisions of C.R.S. 15-12-803 and 804, the United States Supreme Court in *Pope* said that state action affecting property must generally be accompanied by actual *notification of that action.*

> "chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper. Creditors, who have a strong interest in maintaining the integrity of their relationship with their debtors, are particularly unlikely to benefit from publication notice." [p. 489, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950)]. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality "is notice reasonably calculated, under all the circumstances, *to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." [p. 484, citing *Mullane*]. [Emphasis supplied].

It is undisputed that plaintiffs had actual notice of the pendency of the estate proceedings when the alleged cause of action arose on June 8, 1988, and so plaintiffs' arguments are, in all material respects, moot. *Texaco Inc. v. Short, supra,* and *Tulsa Professional Collection Services, Inc. v. Pope, supra,* make clear that due process does *not* require notice of the impending expiration of a period of limitations. Petitioners were afforded a fair opportunity to commence litigation. The non-claim statute ran through October 8, 1988, a period of four months from the date respondent delivered, and petitioners accepted, the deed. During practically all of that four month period in which they had to commence litigation, the petitioners were represented by counsel. They did not take advantage of the opportunity to commence litigation by October 8, but they certainly were not denied a fair opportunity to do so.

c. The non-claim period of C.R.S. 15-12-803 is not so short as to deny due process.

In *Matter of Estate of Daigle,* 634 P.2d 71 (Colo. 1981), the Colorado Supreme Court addressed the purpose of the non-claim statute set forth in C.R.S. 15-12-803 and 804 as to promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors.

> "The heirs of a decedent and the devises under a will often have needs which can be satisfied only by an expeditious distribution of property [p. 76]. . . .
>
> The state also has a legitimate interest in providing for the early and orderly distribution

> of a decedent's assets. The non-claim statute effectuates this purpose." [p. 78].

The U.S. Supreme Court in *Pope* expressly rejected an opportunity to address whether Oklahoma's two month period for creditors to submit claims was somehow unconstitutionally short. There is, however, considerable language in the decision indicating support for a limited period to act on claims.

> "Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the administration and expeditious closing of estates." [p. 479] . . .
>
> " . . . At the same time, the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines . . . " [p. 489].

With that reasoning, this court in effect rejected the substance of petitioners' argument that

> "Why should a decedent's successors, in their understandable desire to put the death behind them and get on with life, be given a shorter period of repose than was the decedent? Why should they not take the decedent's property subject to the same liability – and the same time limitations on that liability – as the decedent? If the substantive claim survives, logically so should the procedural statutory limitations that render it valid and enforceable." [page 15 of Petition for Writ of Certiorari].

IV. CONCLUSION

Under Rule 10 of the Supreme Court Rules, a Petition for Writ of Certiorari will be granted only when there are special and important reasons therefore, and the rule enumerates certain specific reasons which characterize the basis on which a petition will be granted. No reasons of that character exist in this case, and, to the extent they may exist, they have already been fully addressed by this court in *Pope* in a manner which dictates against review of the Colorado Court of Appeals decision in this case. The non-claim statute triggered by the date on which performance under the contract was due, or by the acts which gave rise to petitioners' claims, was self-executing and thus does not involve constitutional due process considerations. Nevertheless, *Pope* has already reaffirmed that due process does not require notice of the impending expiration of a period of limitations. The petitioners in the present action were indisputably aware of the pendency of the probate proceedings from the very first day that their alleged claim accrued. They were not denied a fair opportunity to file their claims by the four month non-claim statute. In *Pope*, an important due process question was addressed where a known creditor was barred from bringing a claim before it ever had actual knowledge of the pendency of any probate proceedings. There simply is no equivalent due process issue in the present case. Respondent Eppinger requests that this

Court deny the Petition for Writ of Certiorari.

Dated: August 25, 1992.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS August 29, 1991
No. 90CA0225

Wishbone, Inc., a Colorado corporation; Joseph Lochi and Francis Lochi,

Plaintiffs-Appellants,

v.

Lula M. Eppinger, personal representative of the estate of Wilmer H. Eppinger,

Defendant-Appellee.

Appeal from the District Court of Adams County
Honorable Donald W. Marshall, Jr., Judge
No. 88CV2601A

Division I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Ruland and Dubofsky, JJ., concur

Berger & Berger, Nathan M. Berger, David Berger, Commerce City, Colorado, for Plaintiffs-Appellants

Aisenberg & Kaplan, P.C., Bennett S. Aisenberg, H. Paul Himes, Jr., Denver, Colorado, for Defendant-Appellee

Plaintiffs, Wishbone, Inc., and Joseph and Frances Lochi, appeal the dismissal of their claims by the entry of a summary judgment in favor of defendant, Lula Eppinger, personal representative of the Estate of Wilmer Eppinger. We affirm.

On February 25, 1988, the Lochis and the deceased entered into a receipt and option contract for the sale and

purchase of "Lots 9 and 10, Holly Hurst Subdivision, County of Adams, Two acres more or less." The contract also provided that the property would be sold "with all easements and rights-of-way appurtenant thereto," and would be free and clear of all liens, encumbrances, and easements except "those of record."

The decedent died in March 1988, and defendant was appointed later that month as personal representative to the estate. On June 8, 1988, the personal representative delivered a deed for the subject property to plaintiffs. The deed conveyed "Plots 9 and 10, Except that portion conveyed to the Department of Highways in Deed recorded August 11, 1961 . . . and except that portion dedicated to the Public in right of way dedication recorded August 28, 1972. . . . "

Plaintiffs accepted the deed and tendered the purchase price as agreed. They claim that later that day they discovered that only 1.711 acres was actually conveyed, such being less than the two acres specified in the contract.

On July 6, 1988, plaintiffs presented to the personal representative their claim against the estate in which they requested an abatement to reflect the alleged deficiency between the deed tendered and the conveyance agreed upon in the contract. On July 15, 1988, defendant's attorney responded to plaintiffs' letter in what the trial court determined was notice of disallowance of the claim.

The letter informed plaintiffs "that you do not have grounds for any lawsuit against the estate." The letter, however, contained no notice that, pursuant to § 15-12-806(1), C.R.S. (1987 Repl. Vol. 6B), there was a 60-

day time limit for them to file their claim with the district court. Plaintiffs filed their claim in district court on December 30, 1988.

I.

Section 15-12-806(1) provides, in pertinent part, that any claim disallowed by the personal representative is barred:

> "unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance . . . if the notice warns the claimant of the impending bar."

Under § 15-12-806(2), C.R.S. (1987 Repl. Vol. 6B), the court may allow, in whole or in part, any claim presented to the personal representative or filed in due time with the court upon petition of the personal representative or claimant if such claim is not barred by § 15-12-806(1).

The question presented here seeks a determination of the effect, under the non-claim statute, § 15-12-801, et seq., C.R.S. (1987 Repl. Vol. 6B), of the personal representative's failure to provide notice of the applicable 60-day time bar in her notice disallowing claims against the estate.

Plaintiffs argue that the timely presentment of their claims to the personal representative pursuant to § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B) vested the trial court with jurisdiction and arrested the application of the non-claim statute. Plaintiffs further argue that the personal representative's noncompliance with the non-

claim statute, by her failure to notify plaintiffs of the 60-day time bar contrary to § 15-12-806(1), in effect tolled the non-claim statute. Hence, they conclude that this failure to trigger the provisions of the non-claim statute invokes either a three or two-year statute of limitations otherwise applicable to plaintiffs' claims, §§ 13-80-101 and 13-80-102, C.R.S. (1986 Repl. Vol. 6A).

Plaintiffs contend that to reach another result would render § 15-12-802, C.R.S. (1987 Repl. Vol. 6B) meaningless. We, however, conclude that the result sought by plaintiffs is contrary to Colorado authority and inconsistent with the purposes of the Colorado Probate Code.

Generally, a claim is allowed by failure of the personal representative to disallow it. *In re Estate of Hamilton v. Egan*, 633 P.2d 1100 (Colo. App. 1981). And, a claim which is defectively or improperly disallowed is treated as though it were allowed. *See In re Estate of Roddy*, 784 P.2d 841 (Colo. App. 1989).

There is no dispute here that the personal representative failed to notify plaintiffs of the time bar as required under the statute. However, the failure to provide notice of the applicable time limitation did not render the disallowance itself defective. Rather, the issue to be determined is the time bar now applicable to plaintiffs' claims.

The non-claim statute provides that the commencement of any proceeding on a claim must occur within the time limited for presenting the claim, which in this case is four months from when defendant's performance was due. Section 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *see* § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B). And, although the 60 days in which to commence a proceeding

after the mailing of notice of disallowance may be extended by the court or personal representative, any extension may not "run beyond the applicable statute of limitations." Section 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B).

Section 15-12-802 instructs as to the applicable limitations and provides, in relevant part:

> "For purposes of any statute of limitations other than those limitations specified in §§ 15-12-801, 15-12-803, 15-12-804, and 15-12-806, the proper presentation of a claim under § 15-12-804 is equivalent to commencement of a proceeding on the claim."

Contrary to plaintiffs' assertions, and even if we assume the inapplicability of the 60-day time limit in which to commence claims, this language does not indicate a departure from the applicable time limits under the non-claim statute for claims brought *against the estate. See In re Estate of Wehling,* 37 Colo. App. 276, 547 P.2d 1289 (1976), *aff'd sub nom. Kropp v. Farmers Insurance Exchange,* 193 Colo. 144, 563 P.2d 943 (1977) (time limitations under Colorado Probate Code do not apply to actions *on liability insurance policies* issued to the decedent).

Section 15-12-803 provides a four-month period in which all claims against the estate must be filed. *See In re Estate of Daigle,* 634 P.2d 71 (Colo. 1981). Failure of plaintiffs' to file a claim that could be considered within that period removed jurisdiction from the trial court to consider that claim. *In re Alperstein v. Sherwood International, Inc.,* 778 P.2d 279 (Colo. App. 1989). And, this time limitation of four months is "much shorter than, and supersedes, all statutes of limitation which might otherwise

have been applicable." *In re Estate of Scott*, 735 P.2d 924 (Colo. App. 1987).

The basic purpose of the Colorado Probate Code is to promote the speedy and efficient settlement of estates. As such, the time limit under the non-claim statute for presentation of a claim is jurisdictional in character. *In re Estate of Daigle, supra; Strong Brothers Enterprises, Inc. v. Estate of Strong*, 666 P.2d 1109 (Colo. App. 1983).

Compliance with the non-claim statute is a condition precedent to the enforcement of a right of action, as opposed to its remedy. Failure to comply with the non-claim statute bars claims asserted after its expiration and deprives both the trial court and reviewing court of jurisdiction over the subject matter of the claim. *In re Estate of Randall v. Colorado State Hospital*, 166 Colo. 1, 441 P.2d 153 (1968); *In re Estate of Plank v. Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973).

Based upon the foregoing analysis, we conclude that the mandatory warning invokes the 60-day time bar only, and failure to give such notice affects only that time bar. *See* § 15-12-806(1). Since it cannot be said here that the failure to warn of the 60-day time bar defeated the substance or intended effect of the notice of disallowance, failure of defendant to comply strictly with this notice requirement only relieves plaintiffs of the requirement to file their claim seeking allowance within 60 days. *See* § 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B) (60 day limit may be extended).

Plaintiffs' claims, therefore, are, by virtue of § 15-12-809(2), barred under the non-claim statute for failure file them within the applicable four-month period.

Plaintiffs have cited no case law or policy to support their contention that a failure to provide notice of the 60-day time bar removes their claim from the requirements and policies of the probate code or implicates the general statutes of limitation. Moreover, a non-claim statute is not a statute of limitations, *In re Estate of Randall, supra,* and to employ such a construction would frustrate the statutory goal underlying the distribution of estates. *In re Estate of Daigle, supra.* Since it affects the jurisdiction of the court to act, it is an absolute bar which cannot be tolled or waived, either intentionally or by implication. *In re Estate of Scott, supra; Barnhill v. Public Service Co.,* 649 P.2d 716 (Colo. App. 1982).

Here, plaintiffs' claim was required to be filed within four-months after performance by the personal representative was due, or by October 8, 1988. *See* §§ 15-12-803(2)(a) and 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *In re Estate of Scott, supra.* Failure to have done so bars plaintiffs' claim against the estate.

II.

Plaintiffs contend that the application of the non-claim statute violates their rights to due process since they were given no actual notice regarding the operation of the non-claim statute.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), upon which plaintiffs rely here, is inapposite. The non-claim statute at issue in *Tulsa* involved substantial state action. The probate court was significantly involved throughout

the probate proceedings, and the time bar was activated by that involvement.

By contrast, the non-claim statute here is self-executing in that it is not triggered by legal proceedings, but automatically lapses upon the expiration of the statutory period. Given this self-executing feature, the lack of prior actual notice to plaintiffs of the operation of the statute does not constitute a deprivation of due process. *See Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

Also without merit is plaintiffs' contention that the statutory time period is too limited to have afforded plaintiffs due process. The government has an interest in the speedy and efficient settlement of estates, *In re Estate of Daigle, supra*, and plaintiffs are presumed to have knowledge of the relevant statutory provisions from the General Assembly's enactment of the statute. *See Texaco, Inc. v. Short, supra; see also Dove v. Delgado*, 808 P.2d 1270 (Colo. 1991) (two-year period for filing negligence action not so short as to deny due process).

III.

Plaintiffs' final contention is that the trial court erred in determining, contrary to the intent of the parties, that the contract merged into the deed. We find it unnecessary to resolve this issue given the bar to plaintiffs' claim against the estate.

Judgment affirmed.

JUDGE RULAND and JUDGE DUBOFSKY concur.